



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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Sparks & Craig, LLP
6862 Elm Street, Suite 360
McLean, VA 22101

DEC 16 2005

RE. MUR 5333
John Swallow for Congress and Stanley R.
deWaal, in his official capacity as treasurer

Dear Messrs. Sparks and Craig:

On June 30, 2004, the Federal Election Commission found reason to believe that John Swallow for Congress and Stanley R. deWaal, in his official capacity as treasurer ("the Committee") violated 2 U.S.C. §§ 441b(a), 441a(f), 441f and 434(b)(3)(A). These findings relate to the Committee's receipt of contributions by Winterfox, LLC, Winterhawk Enterprises; and BMF #1, Ltd. After an investigation, on November 15, 2005, the Commission determined to take no further action regarding its reason to believe findings that the Committee violated 2 U.S.C. §§ 441b(a) and 441f.

Also on November 15, 2005, the Commission found that there is reason to believe the Committee violated 2 U.S.C. §§ 441a(f) and 434(b)(3)(A). These new findings relate to the Committee's receipt of contributions from Robert B. Lichfield and nine other Lichfields in January 2002. The Factual and Legal Analysis, which more fully explains the Commission's findings, is attached for your information.

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Please submit such materials to the General Counsel's Office within 15 days of your receipt of this letter. Where appropriate, statements should be submitted under oath.

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Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A), unless you notify the Commission in writing that you wish the investigation to be made public.

If you have any questions, please contact Mark Allen, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,



Scott E. Thomas
Chairman

Enclosure
Factual and Legal Analysis

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1 **FEDERAL ELECTION COMMISSION**

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3 **FACTUAL AND LEGAL ANALYSIS**

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5 RESPONDENTS: John Swallow for Congress and Stanley R. deWaal, MUR 5333
6 in his official capacity as treasurer
7

8 **I. GENERATION OF MATTER**

9 This matter was generated by a complaint filed with the Federal Election Commission by
10 Scott Clayton alleging that John Swallow for Congress and Stanley R. deWaal, as treasurer,
11 ("Committee") accepted excessive contributions and contributions made in the names of
12 children, in violation of the Federal Election Campaign Act of 1971, as amended ("the Act").
13 See 2 U.S.C. § 437g(a)(1).

14 **II. FACTUAL AND LEGAL ANALYSIS**

15 This Factual and Legal Analysis supplements the Factual and Legal Analysis provided to
16 the Committee on August 16, 2004.

17 **A. Available Factual Information**

18 The available information indicates that ten individuals with the last name "Lichfield"
19 made contributions to the Committee, which disclosed the receipt of \$3,000 from each Lichfield
20 in January 2002. Mr. Swallow was a candidate in three elections during 2002, and so the
21 contributions on their face appear to be within the limits of 2 U.S.C. § 441a(a)(1)(A).

22 The ten Lichfields identified as contributors are husband and wife Robert B. and Patricia
23 Lichfield, their three daughters, Lenae, Loni and Lyndee, and three sons, Reagan, Robbie and
24 Roger. The two remaining Lichfields identified as contributors are Stephanie and Tavia
25 Lichfield, spouses of Robbie and Roger Lichfield, respectively. Another daughter of Robert B.
26 and Patricia Lichfield, Lana Patricia Lichfield, was not identified as a contributor.

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Mr. Lichfield purchased the checks used to make the contributions with funds from the Robert Browning Lichfield Family Limited Partnership ("RBLFLP").¹ Robert B. and Patricia Lichfield are the general partners of the RBLFLP and their seven daughters and sons are the limited partners. Robert B. and Patricia Lichfield each own 3.38% of the RBLFLP and each of the seven Lichfield children owns 13.32%. Stephanie and Tavia Lichfield are not partners of the RBLFLP.

According to Robert B. Lichfield, the contributions appear to have taken place in the following manner. Mr. Lichfield first met the candidate John Swallow at a local Republican Party breakfast in Washington County, Utah, when Mr. Swallow was campaigning in that part of the state. Mr. Swallow was invited to Mr. Lichfield's house, and within a day or two of the breakfast event went there, on January 19, 2002. Once there, according to Mr. Lichfield, Mr. Swallow solicited contributions from Mr. Lichfield and other Lichfields present.² Those Lichfields present agreed at that time to contribute. Mr. Lichfield and Mr. Swallow discussed how to effect the contributions, where two of the family members were minors and did not have checking accounts, and other family members who might contribute were not present. Mr. Swallow suggested the form of RBLFLP distributions to make the contributions.

¹ Robert B. Lichfield described the RBLFLP as at least twelve years old and actively involved in the purchasing and leasing of real estate, with several million dollars of real estate under management. The RBLFLP is registered in Utah as a domestic limited partnership, the Utah State Code does not specifically address family partnerships. *See* Utah Code Ann. Title 48 (Partnerships). Family partnerships are recognized in the Internal Revenue Code, which provides that a person shall be recognized as a partner if he or she owns a capital interest in a partnership in which capital is a material income-producing factor, whether or not such interest was derived by purchase or gift from any other person. *See* 26 U.S.C. § 704(e)(1). Often the interest is given by a parent to a child. *See* 33 Am. Jur. 2d *Federal Taxation* §§ 2025-2034 (Family Partnerships) (2005).

² Mr. Lichfield did not recall which family members were present when Mr. Swallow solicited, but did note that the solicitation did not apply to Lana Patricia Lichfield, who was six years old at the time. According to Mr. Lichfield, Mr. Swallow told the Lichfields that she was too young to understand the process and make an informed decision.

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1 According to Mr. Lichfield, Mr. Swallow was in a hurry, and asked Mr. Lichfield if they
2 could take care of the contributions that day. In fact, according to Mr. Lichfield, Mr. Swallow
3 asked Mr. Lichfield if he, John Swallow, could accompany Mr. Lichfield to the bank and take
4 possession of the contributions there. Messrs. Swallow and Lichfield then went to the bank. Mr.
5 Lichfield, acting as managing general partner, purchased with partnership funds ten \$3,000
6 "official checks." Mr. Lichfield wrote on the bottom of each check the name of an individual
7 Lichfield to indicate the individual to whom the contribution was to be attributed and gave the
8 checks to Mr. Swallow while the two of them were still at the bank. However, Mr. Lichfield
9 says he told Mr. Swallow not to cash the checks until Mr. Lichfield had obtained the approval of
10 the RBLFLP partners not present at the solicitation and until Mr. Swallow had had his lawyers
11 review the arrangement.

12 About a week later, Mr. Lichfield says, he obtained the remaining partners' approval and
13 told Mr. Swallow, who informed Mr. Lichfield that his counsel had favorably reviewed the
14 arrangement. According to Mr. Lichfield, he thus felt reassured that the contributions were
15 permissible and gave his assent to the deposit of the checks. The Committee then disclosed the
16 receipt of \$3,000 contributions from each of the ten Lichfields.

17 **B. The Lichfield Contributions are a Partnership Contribution**

18 Despite the Lichfields' assertions that their contributions constitute individual
19 contributions, for the reasons set out below, the Lichfield contributions are more appropriately
20 viewed as a \$30,000 contribution from the RBLFLP.

21 A partnership such as the RBLFLP is a "person" under the Act. 2 U.S.C. § 431(11).
22 Like any other "person" (except for prohibited sources such as corporations), a partnership is
23 limited in how much it can contribute. See 2 U.S.C. § 441a(a)(1). At the time of these

1 contributions, that limit was \$1,000 per election to any candidate and his authorized committee.

2 At the same time, partners in a partnership, unlike shareholders in a corporation, own the
3 partnership's funds. *See* 59A Am. Jur. 2d *Partnership* § 2 (2003). The partnership regulation at
4 11 C.F.R. § 110.1(e) balances the legal personality of a partnership and the partners' ownership
5 of partnership funds through dual attribution. Under dual attribution, partnership contributions
6 are attributed to both the partnership and to the partners. *See* 11 C.F.R. § 110.1(e). The
7 attribution to the partners can be accomplished in either of two ways: 1) in direct proportion to
8 each partner's share of the partnership profits; or 2) in any other proportion by agreement of the
9 partners, as long as only the profits of the partners to whom the contribution is attributed are
10 reduced and these partners' profits are reduced in proportion to the contribution attributed to
11 each of them. 11 C.F.R. § 110.1(e)(1) and (2). If this dual attribution could be avoided by the
12 simple expedient of converting partnership funds to as many cashiers' checks as it takes to "max
13 out" the number of contributing partners, there would be nothing left of the dual attribution rules,
14 and nothing left of the Act's limitation on how much a partnership could contribute.

15 Nor do the partnership funds become individual contributions because Mr. Lichfield
16 obtained the approval of the various RBLFLP partners. As noted, some of these asserted
17 approvals came after Mr. Lichfield gave the checks to the candidate, i.e., after the contributions
18 were made. Approval of a partnership contribution by the partners *is* relevant – to the attribution
19 of partnership contributions under 11 C.F.R. § 110.1(e)(2). However, this approval does not
20 convert a partnership contribution into individual contributions. Further, the fact that the
21 partnership distribution consists of funds owned by the Lichfields does not turn the distributions
22 into individual contributions. As noted, all partnership funds are owned by the partners. *See*
23 59A Am. Jur. 2d *Partnership* § 2 (2003). Neither does the "distribution's" status as taxable

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1 income of the partners turn the distribution into individual contributions, since, under the Act,
2 the form of the transaction at issue here was effectively identical to a partnership contribution.³

3 **C. The Committee Received an Excessive Contribution from the Partnership**

4 As a partnership contribution, the RBLFLP contribution is subject to the contribution
5 limits set forth in the Act. *See* 11 C.F.R. § 110.1(e) (a contribution by a partnership shall not
6 exceed the Act's limitations on contributions). The limit on contributions to candidate
7 committees in effect at the time of the RBLFLP contribution was \$1,000 per election. 2 U.S.C.
8 § 441a(a)(1)(A). The RBLFLP \$30,000 contribution to the Committee in connection with the
9 2002 convention, primary and general elections, exceeded that limit by \$27,000.

10 The Act prohibits candidates and committees from knowingly accepting excessive
11 contributions. 2 U.S.C. § 441a(f). John Swallow personally received the ten \$3,000 checks from
12 Robert B. Lichfield. Mr. Swallow was aware of Mr. Lichfield's use of partnership funds; in fact,
13 according to Mr. Lichfield, it was Mr. Swallow who suggested the use of the partnership
14 distributions to make the contributions. John Swallow for Congress and Stanley R. deWaal, in
15 his official capacity as treasurer, are liable for the receipt of this excessive contribution, and so
16 there is reason to believe that John Swallow for Congress and Stanley R. deWaal, in his official
17 capacity as treasurer, violated 2 U.S.C. § 441a(f). The Committee and its treasurer are also liable
18 for failing to report the receipt of the contribution from the RBLFLP and instead reporting the
19 ten \$3,000 checks as individual contributions from the ten Lichfields, and so there is reason to
20 believe they violated 2 U.S.C. § 434(b)(3)(A).

21

³ A distribution need not pass through a partner's own account under tax law, which contemplates constructive or deemed distributions. *See U.S. v. Basye*, 410 U.S. 441, 447-48, 453-54 (1973); *White v. Commissioner of Internal Revenue*, 991 F.2d 657, 661 (10th Cir. 1993).

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